THE EXCLUSIVITY BAN IN THE 1992 PROGRAM ACCESS RULES MUST SUNSET

The Exclusivity Ban in 1992

- In 1992, Congress enacted rules barring cable-affiliated programmers from entering into **exclusive contracts** with cable operators, and requiring such programmers to provide their programming to all other multichannel video programming distributors (MVPDs). The **exclusivity ban** – extraordinary in American copyright and intellectual property law – was an exceptional remedy designed to **jump-start competition to cable** by ensuring access to programming.

- Because it was such a substantial departure from U.S. practices and was seen to impinge on the First Amendment rights of some programmers, Congress mandated that that the ban on exclusive program distribution contracts **shall expire** on October 5, 2002 **unless** the Commission concluded that it was **"necessary to preserve and protect competition and diversity** in the distribution of video programming."

- The FCC has initiated a proceeding to determine whether to allow the ban to sunset, and it appears that the FCC is prepared to make a decision shortly.

The Exclusivity Ban has outlived its usefulness. If it is retained at all, it must be tailored narrowly to preserve and protect competition consistent with the statute.

- In the 10 years since Congress first imposed the ban, competition to cable has become formidable. Competitors now hold about 20% of the MPVD market and are growing at three times the rate of cable.

Top Ten Multichannel Distributors (2001)

Rank	Distributor	Subscribers[1/]	Market Capitalization[2/]
1	AT&T Broadband	13,750,000	$47.4 billion
2	Time Warner	12,650,000	$82.7 billion
3	**DirecTV**	**10,962,000**	**$12.3 billion**
4	Comcast	8,437,000	$28.5 billion
5	**Echostar**	**7,100,000**	**$11.8 billion**
6	Charter	6,970,100	$2.34 billion
7	Cox	6,206,700	$20.6 billion
8	Adelphia	5,693,000	$1.7 billion
9	Cablevision	2,988,600	$3.68 billion
10	Mediacom	1,585,000	$1.49 billion

1/ Cable company statistics are taken from the National Cable and Telecommunications Association, September 2001; Satellite company statistics are taken from SkyREPORT, February 2002.

2/ All financial metrics are taken from Yahoo.com Market Guide

- Established MVPDs such as the large DBS providers certainly no longer need the assistance of the program access rules to be a competitor to cable, and the rule should be permitted to lapse as Congress intended.

- **DirecTV and EchoStar unquestionably offer viable and durable competition** to cable. The largest DBS providers have ready access to capital, substantial market capitalization, attractive subscriber bases, phenomenal growth rates, and can command access to programming – including **DBS-only exclusive programming such as NFL Sunday Ticket©** - that exceed the size, reach, and command of most cable operators. With a total of 17 million DBS customers, combined revenues of almost $25 billion, they are respectively the third and fifth largest MVPDs in the country; their size makes them critical to any programmer.

Five-Year Growth Rates (1996-2001)

Subscriber	Growth (Subscribers)	Growth (Percentage)
Echostar	**6,904,000**	**3,522.4%**
DirecTV	**8,853,743**	**420%**
Adelphia	3,984,955	233.3%
Comcast	4,199,046	99.1%
Cox	2,904,955	88%
Cablevision	215,706	7.8%
Time Warner	900,932	7.7%
AT&T Broadband	-3,580,590	-21.7%

- By contrast, Cablevision Systems Corp. has 3 million subscribers and has total revenues across all businesses of about $3.5 Billion – **yet under the current program access rule, Cablevision is forced to support its DBS competitors with all the fruits of its creativity and program development resources.**

- **EchoStar and DirecTV have the financial strength to develop their own unique program offerings**. EchoStar raised billions of dollars in the capital markets to fund its purchase of DirecTV, which has itself enjoyed the financial backing of GM and Hughes for many years.

- The FCC should not continue to subject Cablevision to **exclusivity restrictions** that **deter investment in programming**, while allowing much larger rivals to use exclusivity to gain a competitive edge.

- **Lifting the exclusivity restriction will intensify competition and** foster innovation, by spurring DBS and other competitors to make programming investments of their own. Such a dynamic would **benefit consumers**, by providing them with more choices and more programming.

There is no evidence that exclusivity will substantially disadvantage DBS

- Proponents of program access often cite regional and sports programming as a reason that the ban on exclusivity must be preserved, but evidence of the impact of exclusive regional and sports programming demonstrates otherwise. Cablevision founded and launched the **Metro Channels** and **News12** more than 3 years ago. This programming is distributed terrestrially and therefore is not subject to the exclusivity ban. Evidence shows that as distribution of this exclusive programming has expanded – both in terms of the volume of programming and the base of subscribers to whom it was delivered – DBS has continued to grow in Cablevision's territory. In fact, the rate of DBS growth in the NY Metro area has increased even as Cablevision has continued to air regional sports and exclusive news programs on its exclusive Metro and News12 Channels.

Restoring the full bundle of copyright protections, including the right to exclusivity, will enhance competition

- The exclusivity ban is an extraordinary departure from American copyright law, marking an aberration in the standard rights of creative artists in service of an industrial policy that is now impeding competition in service of a goal – viable competition to cable – long since achieved.

- Barring programmers from using exclusivity as a marketing tool to penetrate new markets and get a toe-hold with distributors discourages such investments and has diminished innovation in new content development that would benefit consumers.

- Permitting creative artists to use exclusivity will allow programmers and MVPDs to differentiate themselves in the market place. Competition between distributors will flourish; what is today merely price differentiation will blossom into competition on content – driving greater investment into original, local, niche, high-definition and special interest programming that will increase the value of cable and satellite programming to meet consumer demand.

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